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TEMPLE PROPERTIES AND *BONA FIDE* PURCHASERS.

The doctrine of '*Bonafide* purchase for value without notice', of a trust, is laid down in S. 64 of the Indian Trusts (Act II of 1882) as follows: "Nothing in S. 63 entitles the beneficiary to any right in respect of property in the hands of (a) a transferee in good faith for consideration without having notice of the trust."

S. 1. of the Indian Trusts Act, however, says 'that nothing herein contained applies to public or private, religious or charitable endowments." S. 64 however only reproduces a well-known rule in English equity jurisprudence which has been acted upon by Courts of Equity in England from a very early time. In this article it is proposed to examine the applicability of this principle to the case of a *bona fide* purchase from the trustee, of property belonging to a temple and to examine also the true legal position of trustees with reference to such properties.

The question is not covered by any authority, and both in *Juggut Mohini Dossee* v. *Mussumat Sokhee Money Dossee*[1] and in an appeal from North Arcot recently decided by the Madras High Court, *viz.*, *Sowcar Govinda Doss* v. *Raja of Karvetnagar*, [2] the point was raised but was not decided as it was found unnecessary to do so. The absence of authority on so important a question—important on account of the multitude of religious and charitable institutions of different kinds in this country — is of course a curious circumstance. But the settlement of it as well as of other matters relating to such institutions is eminently the proper province of legislation. The interest and zeal evinced by the Legislature in England in the cause of charities in general would be borne out by the multitude of statutes which it has passed from time to time, so that hardly any question concerning them seems to be uncovered by some

1. (1871) 14 M. I. A. 289. 2. (1914) 27 M. L. J. 195.

legislative provision or other. Our legislature has, on the contrary, been till now maintaining an attitude of extraordinary indifference, especially in the case of Religious Endowments. Act XX of 1863 still stands alone in the statute-book despite the agitation of the last half a century, and despite also the verdict of experience which has shown it to be as inefficient as it is inadequate. There are signs, however, of our legislators rousing themselves to move in the desired direction, and one can only hope that false fears or false notions of policy will not continue to stand in the way of an earnest attempt being made to meet the various difficulties which so often arise and provide material for speculative litigation. Not the least important of such questions demanding solution is the one which forms the subject of this article.

The rule which extends protection to a *bona fide* purchaser has, as already observed, been acted upon from a very early time in England and is in fact as old as the jurisdiction of Courts of Equity over Trusts. No distinction has ever been made in its application between private trusts and charitable or religious trusts. As early as 1601 A. D. it was applied to charities by the Statute of the 43rd of Elizabeth Ch. 4, S. 6. The courts also have applied the principle to charitable trusts: see for instance *Attorney-General* v. *Wilkins*, [1]. A number of decisions to the same effect are cited in Tudor, p. 244, &c., Lewin on Trusts p. 1101, Dart on Vendors and Purchasers Vol. II, p. 933, Sugden Vol. II, p. 594 and Halsbury's Laws of England Vol. IV, p. 200. There will not therefore be any warrant for our making a distinction in this country between one class of trusts and another in applying a principle which we have borrowed from the English Law. We have, therefore, to examine the rationale of the rule itself and see what are the essential requisites for its application, and how far they are present in the case of endowments made in favour of temples.

In English law, the doctrine came into vogue as an application of the rule that 'where the equities are equal, the law prevails'. In other words, Courts of Equity refused to interfere in favour of a plaintiff whose equity was equal to that of the defendant, 'since both were equally innocent

1. (1858) 17 Beav. 285, s. c. 51 E. R. 1043.

and equally diligent.' The *cestui que trust* whose remedy lay only in a Court of Equity could not obtain as against a *bona fide* purchaser the writ which ordinarily would be issued by that court against persons in possession of trust property for enjoining them to fulfil the trust. It follows that such a plea of *bona fide* purchase would, be upheld, only when the purchaser had obtained *the legal title* to the property. The court considered it inequitable that the plaintiff should deprive the defendant-purchaser of what was said to be his '*tabula in naufragio*' see Story's Equity p. 44, and p. 1021, and the observations of Lord Cairns in *Heath* v. *Crealock* [1]. If the purchaser had only an equitable title, another maxim came into play, *qui prior est tempore potior est jure*; and the equity of the plaintiff which is prior in point of time prevailed over that of the purchaser.

Accordingly, where a trust-estate is interposed in an endowment of property in favour of a temple or other religious or charitable institution, there is nothing to prevent the application of the above rule in favour of a purchaser from the trustee without notice of the endowment. But the doctrine would have no application if there is no trust and consequently no division of the legal and equitable estates in the property. The observation of the Privy Council in the Tagore case that "the anomalous law which has grown up in England of a legal estate in one set of courts and an equitable ownership which is paramount in Courts of Equity does not exist and ought not to be introduced into Hindu Law," cannot be taken to mean that trusts can be created or can exist in this country without the splitting of the two rights in the property. If that was meant, it must be taken to have been overruled by the Indian Legislature which has recognised that division by enacting the Trusts Act in 1882. See S. 3. Even in England, the 'anomalous law' has been abolished by the Judicature Act only so far as the duality of jurisdictions is concerned, but the law still continues to recognise the two kinds of rights or interests in the property as brought about by the creation of a trust. It would be a question of construction.

1. (1874) L. R. 10 Ch. App. 22 at p. 29.

of the deed of endowment and where there is no deed, of inference from the history and circumstances of the particular endowment, whether a trust was created and the legal title in the property was transferred to the trustee as such, or whether the property was intended to be given direct to the idol or other charitable object without the interposition of a trustee, and the person appointed, if any, was merely intended to be a manager to look after the endowment. For instances of the former description, see *Ranjit Singh* v. *Jaganath Prosad Gupta* [1], *Juggut Mohini Dossee* v. *Mussumat Sokheemoney Dossee* [2], *Bishenchand Basawut* v. *Syed Nadir Hossein* [3], *Rupa Jagshet* v. *Krishnaji Govind* [4], and *Sathianama Bharathi* v. *Saravana Bayi Ammal* [5], and of the latter, see *Jaggodamba Dossee* v. *Puddomoney Dossee* [6]. *Tyabunisia Bibi* v. *Kunwar Sham Kishore Roy* [7], *Reghubai Dial* v. *Kesho Ramanuj Das* [8], and *Maharanee Shibessouree Debia* v. *Moothooranath Acharji* [9]. In any case, the onus will be on the defendant-purchaser alleging a *bona fide* purchase to show that the legal estate vested in him by means of the sale.

Having regard to the antiquity of most of the endowments of our temples and having regard also to the fact that as Justice Markby observes in 2 B. L. R. O. C. J. p. 47, trusts were unknown to the ancient Hindu Law and are a recent introduction from England, it may not be correct to presume that the donor made an endowment through the medium of a trust. In England, such assurances are generally in the form of an express trust. See Halsbury, Vol. IV, p. 126: and Tudor p. 84, Here as their Lordships remark in *Anantha Tirtha Chariar* v. *Nagamuthu Ambalagaren* [10], very probably, such endowments took the form of grants to the idol. Neither in England nor in India however is a trust necessary for such a purpose. See per *West*, J. in *Manohar Ganesh Tambekar* v. *Lakshmiram Govindaram* [11]. In this matter, therefore, there is no question

1. (1885) I. L. R. 12 C. 375.
2. (1871) 14 M. I. A. 289.
3. (1887) L.R. 15 I. A. 1.
4. (1884) 9 B. 169.
5. (1893) I. L. R. 18 M. 266.
6. (1875) 15 B. L.R. 318.
7. (1871) 7 B. L. R. 621.
8. (1888) I. L. R. 11 A. 18.
9. (1869) 13 M. I. A. 270.
10. (1881) I. L. R. 4 M. 200.
11. (1887) I. L. R. 12 B. 247.

of any presumption either way, and the defence of *bona fide* purchase has in each case to be supported by strict proof of all the legal essentials that would sustain it: *viz.*, (1) that there is a trust; (2) that the legal estate was in the transferor or trustee; (3) that the transferee acquired it by means of the purchase, (4) his purchase was for consideration and without notice of the trust. The same test can also be applied to cases of what may be called partial trusts, different forms of which are dealt with in Mr. Ganapathier's book on Endowments (P. I. of the Introduction).

To cases of simple gifts or dedications of property in favour of idols for their worship, &c., without a trust interposed, the above principle cannot apply. The proposition so stated is simple in itself and would not be difficult of practical application, but for the fact that some of our Indian enactments as well as decisions have used expressions like 'trustee,' 'vesting of property,' &c., in a loose and non-legal sense. One instance may be at once mentioned. S. 92 of the Civil Procedure Code begins by saying, " In the case of any alleged breach of *any express or constructive trust, &c.*" and clause (c) says *"for vesting any property in a trustee."* No difference has been made by decided cases in the application of this section between endowments which are trusts and those which are direct gifts in favour of idols. If the numerous decisions of the Privy Council and of the High Courts are correct which hold that a temple trustee in the latter class of cases would have no legal title in the properties, and that such properties would vest only in the idol, a prayer 'for vesting property in a trustee,' in the legal sense of those words, would, to say the least, be a totally inappropriate relief. It would also be difficult in the face of those decisions to assume any constructive trust as between such a trustee and the idol or its properties, as a 'constructive trust' is understood in English Law. See Snell's Equity, p. 135 and Lewin on Trusts, p. 201. The Religious Endowments Act (Act XX of 1863) again, uses terms like 'trustee,' 'manager', &c., without pointing to any differences between their respective legal capacity or powers. Ss. 4 and 12 speak of the Local Government 'transferring property to the trustee, manager, &c. or to the committee' in apparently a similarly non-technical sense.

The Bengal Regulation XIX of 1810 and the Madras Regulation VII of 1817 from which much of the terminology of Act XX of 1863 is borrowed are open to the same criticism. The use of these expressions in the above enactments may be contrasted with those in the Charitable Endowments Act (VI of 1890) which is drafted on the lines of the Charitable Trusts Acts of England. These Indian enactments are of no assistance in ascertaining the true legal position of these so-called trustees and the true theory of ownership in temple property, and it is to the Hindu Law, scanty as its provisions are on this subject, supplemented to a great extent by the decisions of our courts that we have to turn for solution.

The position is very different in England. The whole law of 'Charities,' in the broadest sense of the word, has been reduced to a number of statutes. A perusal of those statutes passed since 1853 will show what great care is taken to see that the legal title in all property held for a charitable purpose is made to vest, without any break in continuity and any room for uncertainty in some definite person or body of persons. See for instance 16 and 17 Vict. C. 137, Ss. 48, 69, 66; 35 and 36 Vict. C. 24, 54 and 55 Vict. C. 17, S. 3, 56 and 57 Vict. C. 73 S. 5 (2), Ss. 19 and 75, &c. If expressions are used in any other than a strictly legal sense, it is said so expressly as in 56 and 57 Vict. C. 73 S. 75 (2), unlike our Act XX of 1863. With regard to Religious Endowments there are also a number of statutes supplementing the Ecclesiastical Law. Under that Law, particular officers of the church are recognised as trustees of church property and as corporations sole; for instance, church-wardens are so recognised for certain purposes. See Phillimore's Ecclesiastical Law, Vol. II, P. 1484. Various Acts constitute persons called Ecclesiastical Commissioners, Church Trustees, etc., to be vested with the legal title in church property. See also with regard to this question 6 and 7 Vict. C. 37, Ss. 22, 31 and 32 Vict. C. 109, 46 and 47 Vict. C. 36, Ss. 5, 12.

In India, a complete law of charities is yet to be enacted. The Hindu Law is meagre in its provisions as to endowments; Mr. Saraswati in his Tagore Law Lectures on Religious Endowments complains that this subject does not form any

It is very doubtful, speaking with the greatest respect, whether it is open to any learned judge at this time of the day, to propound a theory, such as the one that Justice Mukerjee lays down in the Calcutta F. B. case, a theory which would at one stroke practically upset all the decisions above referred to. It is not clear whether it was even necessary for him to lay down this view for supporting his decision, since he and the other learned Judges hold that the rule in the Tagore case based as it was upon the text of Jimutavahana, "*relinquishment in favour of a donee who is a sentient being*" applies to secular gifts alone, and not to religious dedications. See *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra* [1]. Besides, the Chief Justice and to some extent Justice Chatterjee also, rest their decision on the ground that the rule will in any event not apply to the case before them, in which property was conveyed to trustees for establishing an idol and not given to it direct *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra* [1]. However that may be, no Judge can now well ignore or overrule the settled principle of law that idols can hold and be vested with property. Both Justice Stephen and Justice Chatterjee affirm this principle, *viz*, that the idol is owner, though in a secondary or ideal sense, and do not lend any countenance to the theory of the property being devoid of ownership or being *extra commercium*.

The importation of an ideal or secondary sense seems, however, to be not only unnecessary but also elusive and misleading. The ideal nature of the ownership is of the very essence of the conception. The case of a Corporation will illustrate the point. Savigny in his 'Jural Relations' translated by Rattigan (at p. 181) observes that the essential nature of all Corporations is that the subject of the right does not exist in the individual members thereof (not even in all of them taken collectively) but *in the ideal whole*". If such an ideal whole can hold property, why not an ideal entity which to the votary is merely embodied in an image for purposes of worship? The idea of 'juristic persons' has been in other systems of law, applied to the Gods, and eminent Judges like Justice West agree that the conception is not foreign to Hindu Law. In *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra* [1], Sir Lawrence Jenkins quotes a passage from the Maha Nirvana Tantra, which gives expression to the same idea as follows:

1. (1909) I. L.R. 37 C. 128.

"Property thus given by a man or appropriated by him to religious uses cannot be set aside by his son and the rest. The giver can no longer resume it because *Dharma is the then master or owner of such property.*" The refence to 'an ideal sense' cannot be made therefore to nullify the conception of a juristic person of which it is a necessary part. No such effect seems to have been intended by the Privy Council which made use of the phrase 'in an ideal sense', in the case reported in *Maharajah Jagadindranath Roy* v. *Rani Hemanta Kumari* [1], to which Justice Mukerjee makes reference. In that case the Privy Council while affirming the capacity of the idol to own property as a juridical person, distinguished the right of ownership from the right to sue or the right to possession which from the very nature of the case must vest in the person representing the idol in its external relations, and the exemption, provided in favour of minors by S. 6 of the Limitation Act is applied to the manager who would within the meaning of the section be the person entitled to sue. It is therefore not permissible to whittle down the principle laid down in these cases by adding or emphasising limitations which are really unmeaning.

Assuming it were open to the learned Judge to deal with the matter as if it were *resintegra* it is not at all clear whether his conclusion necessarily follows from the review of original authorities which his judgment contains. The conclusion is stated at p. 155: "we start with the position that in the case of deities there cannot be any acceptance, and therefore, necessarily, any gift. If, therefore a dedication is made in favour of a deity, what is the position? The owner is divested of his rights. The deity cannot accept. In whom does the property vest? The answer is, the king is the *Custodian* of all such property." The last sentence apparently means that the property vests in nobody, but the king presumably in his character as *parens patriae* can take *the custody* of the property and manage it on behalf of the deity.

It is rather difficult to make out from the judgment whether the ownership not passing to the Deity is because of the impossibility of an acceptance or because of the incapacity of the deity to own properties. As far as the first of

1. (1904) L R. 31 I. A. 203.

these two grounds is concerned, it is quite clear that it can have no force whatever so far as gifts made before 1882 and governed by the Dayabagha Law are concerned, since according to Jimutavahana property would vest in the donee even before acceptance. See Stokes Hindu Law Books, p. 188. The Bengal author in fact criticises Vignaneswara's view which holds that the donee's right is completed only by acceptance, as virtually making the acceptor the giver. In commenting on a text of Dhaumya, Jagannatha says in his Digest, " According to the opinion of those who maintain property is vested by mere gift without acceptance, *a thing which is given to a deity* whose essence is a text of scripture *becomes the property of that deity* ; " see Colebrooke Vol. II, p. 190. Further the argument based on the necessity of acceptance, on the presumed incapacity of deities to accept, cannot help the learned judge in arriving at his conclusion. If a gift is made in favour of one incapable of accepting, what is the consequence ? It will have no effect and will certainly not put an end to the donor's rights in the property. The learned Judge gives extracts from the works of Raghunandana and Sree Krishna at P. 148-149, who maintain this opinion. These writers do not however say that a gift in favour of a deity would be an exception to that result. One fails to see how they can support the learned Judge.

The difficulty is, however, sought to be avoided by explaining dedication by the theory of '*an abandonment and no gift*', which practically amounts to a sort of *via media* between a valid and invalid gift. In the first place it must be observed that the idea of an abandonment is wholly artificial, since no man who dedicates property, say, to an idol imagines that he is merely abandoning his rights therein and leaving it to the mercies of the Sovereign Power. His idea, on the contrary, is one of gift in the ordinary and natural sense of the word, and he does intend to give it and give effectually too, to the deity or idol concerned, and make it henceforth its property. Besides, in most of our scriptures and other ancient books, the word commonly used in this connection is 'gift' or other variations of the same word. See the passage from Katyayana cited at 37 Cal. p. 155 and the other references given at p. 165. The word देयं or ' should be *given* ' is used in Angiras Smriti in enjoining such gifts: देवतानां रूगुणांचमातापित्रोस्तथैवच । पुण्यंदेयं......) See Parasaramadhaviya p. 178.

Some other references to the use of the same word may be seen at p. 136 of Mr. Saraswati's book on Endowments. The passages from Shoolapani cited at 37 Cal. p. 147 only show that the word is used in a secondary or figurative sense in such cases. That is the conclusion to which Sabara in his commentary on the Purva Mimamsa (IX chap. I Pada, IV Adhikarana) comes after a discussion as to whether deities have विग्रह a physical form or not. The same is also pointed out by Medhathithi. All that these authors mean—and no objection can be taken to it—is that a gift in favour of a deity being fictitious in every respect except the abandonment by the donor, is used only in a गौण or भाक्त sense, *i.e.* secondary or figurative sense, as other expressions like property *ownership*, &c., when used in the same connection. No doubt a gift to an idol is figurative in the sense that the donee is a fictitious person but the fiction is one which does not deter the piously disposed donor from making the gift or the law from effectuating it.

But there are other objections besides artificiality to this theory of abandonment. Every gift implies an abandonment by the donor of his rights, and if a gift is made in favour of a deity, there is no reason why the peculiar consequences attributed to an abandonment as such, should not follow from that gift. It would be obviously unreason to say that if a donor intended a gift, no effect would be produced in law, but if he merely intended to abandon in favour of the gods, the result would be different. Neither the passages from Sabara nor those from Medhathithi can be understood in any such sense. They only emphasise the metaphorical use of the expressions, gift, ownership, &c., and do not intend to deny all legal ownership in deities, as will be shown presently. Nor does Raghunandana who is cited at the end of p. 148 and who maintains that an abandonment in favour of a person who does not accept would not terminate the ownership of the donor, recognise an abandonment in favour of a deity as having different consequences. It would thus appear to be a mere question of words whether a dedication is called a gift or an abandonment.

But it would be absolutely futile to invoke the assistance of any such theory of abandonment if the true position is that the Gods are capable of ownership in law. If property can vest in

them, there is no object in treating the transfer from the donor to the deity as any other than a gift. The commentary of Medhathithi on Manu (Chap. XI, v. 26) does not militate against that position. The sloka in Manu runs thus : " That wicked man who through covetuousness misappropriates *Devaswam* (God's property) or *Brahmanaswam* (property of Brahmans) subsists in the next world on the leavings of vultures." Sloka 20 of the same chapter has also to be read in this connexion: "The wise consider the property of those who perform sacrifices (habitually) as Dewaswam: and call that of the men who do not so perform as Asuraswam." The commentary on the 26th sloka is as follows. "The property of persons of the three regenerate castes who habitually perform sacrifices is Devaswam: and the property even of those Brahmans who do not perform them is Brahmanaswam: it is thus that the sloka reads. The sloka about the property of those persons who habitually perform sacrifices (sloka 20) is (however) a laudatory sloka intended to praise such people); and the expression (Devaswam) is not used in the primary sense imported by its component parts; like such words as 'stealing' and the like. Therefore it (the meaning) can be explained in another manner. Devaswam (God's property) is what is relinquished (given) with the Gods in (one's) view for the performance of sacrifices and the like, since the primary (ordinary) relation (incidents) of ownership of property is absent in the case of the Gods. Because the Gods do not spend the property according to their pleasure nor is any act by way of protecting the property visible in their case. (The popular view) of the world is that property possesses those characteristics (of being spent and protected.) *Therefore when it is said with the Gods in view, 'This is not mine, This is God's', that becomes God's property.* And this is enjoined (to be done) in favour of Agni and such like Gods during Darsapurnamasa sacrifices and the like, and the practice of the learned is well-known to enjoin (the same thing being done) in Durga sacrifices and the like which are secondary methods (of attaining spiritual merit). In the world, however, the property connected with images like the four-armed and the like is said to be Devaswam. It would of course be proper to place the popular acceptation on an expression used in the shastras. That would be so, if the expression Devaswam acquired a technical meaning as an indivisible expression (having no reference to the meaning of its com-

ponent parts). It is however preferable to consider the total meaning of the expression as derived from that of its component members, that is, Devas' (Gods') swam (property) is Devaswam. Nor is there any authority for understanding it with the addition of other (extraneous) words. The very use of the word 'images' negatives the primary idea of a Godhood (the status of Gods) in the four-armed and the like. If however the above quality (of Godhood) is absent (in such images), then let their property be (considered) Devaswam by (force of) usage (custom of the people). The primary relation (incidents) of ownership of property is wanting. In the said manner the use of the word 'property' may be explained. This is discussed in the second chapter." The above seems to be a correct rendering of the commentary. The translation given of the passage नचयद्युक्तलक्षणं......देवस्वं...... भवतु in *Bhupati Nath Smrititirtha* v. *Ram Lal Mitra*[1] appears to be incorrect. Kullukabatta in his commentary on the same sloka says, "Property relinquished (given) in favour of images and the Gods is Dewaswam." Medhathithi in commenting on the 189th sloka in the II chapter of Manu to which the above reference is given says,.... In the chapter on Punishment, the word God is used in the sense of images only......... The word Devadravyam (Gods' property) should be understood in a secondary or figurative sense only, since they have no ownership in the primary meaning of the term." After citing the above passages from Medhathithi, Justice Mukerjee says, "It is conclusively established from these authorities that according to strict Hindu juridical notions there can be no gift in favour of the Gods."

With great respect, it must be said that the above disquisition of Medhathithi has no bearing on the subject of gifts. The commentator discusses how Dewaswam is Devas' *property*; if property, as is popularly supposed to mean, is what the owner spends and enjoys. After disposing of the definition given in sloka 20 which, he remarks, is merely laudatory, he then takes up the objection that Gods cannot spend or preserve their property. He concludes the argument by saying that if a man says 'This is not mine but it is God's, *it becomes God's property*." He also remarks that the preferable meaning of the expression Dewaswam is Dewas'swam. The same effect, he says, is produced by offerings in that form in other sacrifices not enjoined

1. (1909) I. L. R. 37 C. p. 152 and 166.

in the vedas but sanctioned by custom. All this is, if anything, only an emphatic assertion of the capacity of deities to have property, and a recognition of a valid transfer of rights from the votary or offeror to the deity. No theory of 'res extra commercium' or anything like it is even remotely hinted in the course of the discussion. He next takes up the question of the property of images. He admits that they cannot be Gods and therefore the word 'Devaswam' cannot literally apply in their case: but concludes that their property too will be Devaswam in the same manner by force of the customary practices of the people. That is, if a man says, 'This is not mine but it is this image's,' it will become its property. In this, Kullukabatta also agrees. It would be completely misunderstanding the above passages if the reference to the absence of the primary relation of ownership is to be understood to negative all idea of legal ownership in deities or images. The absence of that primary relation is also emphasised by Sabara in his commentary on Jaimini (IX, 1,4) referred to at p. 150, in which, however, he admits that the capacity of Gods to own property is established by the smiritis, by usage, etc., स्वामित्वं स्मृत्युपचार अन्यार्थदर्शनं ; and gives instances of each. This antithesis between the capacity to own property and the incapacity to exercise acts of ownership is common to all juristic persons as is pointed out by Savigny in his 'Jural Relations' at p. 210.

If a deity then can be vested with property, it is absolutely immaterial how the transaction is called. There may not be any great difficulty in viewing it as a gift. A law which is exceedingly partial in the case of religious and charitable gifts may well be supposed to waive also express acceptance by the donee. But our scriptures and our other sacred books may not at all be ready to concede that deities are not volitional beings or are not capable of accepting a gift. Justice Chatterjee combats the view that they are not sentient beings, see 37 Cal. 166.

The Yajur Veda for instance, speaks of Indra being satisfied with offerings given by men and showing his gratitude by blessing them with presents of children, cattle, etc., तृप्त एवैनं इन्द्रः प्रजयापशुभिः तर्पयति Gods are supposed to ask for or desire gifts: See Manu, chap. III, v. 80: if they can ask for them, they can also accept them. If they have a mind and a volition, we can well assume a mental acceptance on

their part as is prescribed by the Mitakshara in the commentary on sloka 27 of the Vyavaharakanda of Yagnavalkya, where acceptance is said to be *mental, verbal* or *corporeal.* Mr. Saraswati says that an idol makes a *corporeal acceptance* of a gift of the temple in which it is located by taking bodily possession of the premises. But it is perhaps unnecessary to make any of the foregoing assumptions, since acceptance can be made on behalf of the donee by another. The Hindu Law recognises gifts in favour of minors, in whose case the guardian would signify the acceptance. See Trevelyan on Minors P. 27, 28, and 33 M. 312 at p. 314. The lawfully appointed manager can similarly represent the deity. As far as idols are concerned, the law treats them as Juristic persons after consecration, or Pranaprathishta as it is called. This idea seems also to be common to the English law which recognises similar legal consequences to follow from the Consecration of a church. See Halsbury Vol. 11, P. 730, 792. There is therefore no difficculty in treating a dedication as an ordinary gift or in considering deities or idols to be capable of acceptance and of ownership.

The fallacy in the argument of Justice Mukerjee in *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra* [1], seems to be really due to his importing the Roman theory of consecration into the discussion. The effect of such consecration when made with the prescribed formalities (for which see Whitfield's Roman Law, p. 336) was to make the property res sacrae, which was one variety of res 'extra patrimonium' according to Justinian's classification of *res* (things). It is not quite clear that the expressions extra patrimonium or extra commercium which as translated in the books on Roman Law only mean 'incapable of ownership by private individuals', necessarily exclude the idea of divine ownership: for instance Moyle in his book on Roman Law points out that res universitas, another variety of 'res extra patrimonium' would imply the ownership of the state, of ecclesiastical bodies, of churches, &c., Savigny points out, however, that "the effect of such consecration would be to withdraw the property from the sphere of Ownership, and it would not belong, in a proprietary sense, to the temple or the priests." Jural Relations, p. 183. It is enough to remark that no

1. (1909) I. L. R. 37 C. 128.

such peculiar theory is recognised or applied by the Hindu Law with reference to gifts to the Gods or Idols. The Hindu Law on the contrary, is not in favour of property being held in abeyance or being supposed to pass out of one till it is received by another: Mayne's Hindu Law (8th Ed.,) P. 512. The theory of Justice Mukerjee is in conflict with this principle.

A more suitable analogy is furnished by the later Roman Law in the notion of juristic persons, *i.e.*, ideal objects capable of ownership of property. This idea has been applied to the Gods by other systems of law. Pollock and Maitland's History of the English Law Vol. I, p. 481. And it has been so applied in this country by the series of decisions already referred to. This is perfectly in accordance with the immemorial beliefs and practices of the people including their lawgivers. Even the author of the Purva Mimamsa which is considered to be comparatively heterodox in its doctrines could not completely shake off such beliefs, as will be seen from the following commentary on chap. VI, Pada V, adhikarana I by Madhavacharya; अत तस्मिन्नेव ......कर्मणिनिरुप्तहविषः पूर्वदेवताभ्यः अपनयोऽभिधीयते......ततः पूर्वदेवतास्त्यक्त्वा........देवताभ्यः पूर्वनिरुप्तं हविः प्रदातव्यं । "When oblations are offered to certain deities on the Trayodasi night in the mistaken belief that it is Chathurdasi, a process of withdrawing them from those deities and giving them to others is prescribed by the Sutra of Jaimini. It is assumed that by the gift of the oblations, they would become the property of the deity to whom they are offered. To the same effect is also the Commentary (Bhatadipika) of Kandadeva (Mysore Ed.), who in various places assumes the acceptance of gifts by deities: देवस्वादिव्यवहारहेतुः स्वीकाराख्य : सम्बन्धविशेषः (the reason of property being called Devaswam, &c., is the acceptance of such property by the Gods)."

If then the property vests in the deity or idol by means of the dedication, what is the position of the trustee as he is called? Various analogies have been used by decided cases to illustrate his position: that of trustee in the legal sense, in *Thackersey Deoraj* v. *Hurbuny Nursey* [1], and others: that of guardian of a minor in *Prosunno Kumari Detya* v. *Golab Chand Baboo* [2], that of agent in *Seshadri Iyengar* v. *Nata*

1. (1883) I. L. R. 8 B. 432. 2. (1875) 2 I. A, 145.

Raja [1]. Some others lay down that he is a mere manager, whatever that may mean: 7 B. L. R. 621, 28 Bom. 215. and 15 B. L. R. 318. But all the courts are agreed that he has no legal ownership in the property which is essential in a trustee properly so called. Neither the Regulation VII of 1817 nor the Act XX of 1863 affects this conclusion. The former merely affirmed the Crown's power of superintending religious endowments and vested that right in the Board of Revenue and did not alter in any respect the powers or the position which the trustees, managers etc. already had in relation to the properties in their charge. Nor were such powers or position altered by the Act of 1863, See S. 6. The fact that their powers and duties are in many respects similar to those which trustees of express trusts possess under the general law ought not to be allowed to obscure their true legal position. That there can be no question of constructive trust in their case is also fairly clear. See Pomeroy's (Equity Jurisprudence.) Vol. III, p. 2009.

A conveyance by such a manager or trustee cannot therefore, affect the property of the idol unless it be by force of a legislative provision like art. 134 of the Limitation Act, which would give the purchaser a perfect title after 12 years. He cannot avail himself of any equitable plea of '*bona fide* purchase without notice of the trust,' since his vendor is merely a trustee by metaphor and has no legal estate to part with. To hold otherwise would be to fall into the very error which, as Lord Westbury points out, is the result of an incorrect legal designation of parties and relations. "The application to a man who is improperly and by metaphor only called a trustee, of all the consequences which would follow if he were a trustee by express declaration, holding the property exclusively for the benefit of the *cestuis que* trust well illustrates the remark of Lord Macclesfield that nothing is apt to mislead as a metaphor." *Knox* v. *Gye* [2].

S. RAMASAMI IYER,

High Court Vakil

Mylapore.

1. (1897) I. L. R. 21 M. 179 at P. 201.
2. (1872) L. R. 5 E. and Ir. Ap. 656, 675.

SUMMARY OF ENGLISH CASES.

Folkestone Corporation *v.* **Brockman and others** 1914 A. C. 338.

Highway—Dedication—Crucial question—Animus dedicandi—Presumption from long user—Whether presumption of law or fact.

The crucial question to be determined in ascertaining whether a street is a highway or not is the intention to dedicate the same as a highway on the part of the owner; and long continued user by the public may be taken as evidence of an intention to dedicate.

If upon the evidence before the justices, they came to the conclusion that the owner did not intend to dedicate the road as a highway, it was a finding of fact and the High Court has no jurisdiction to interfere in a case stated on a question of law.

Per Lord Atkinson, Proof of long, continuous and uninterrupted user of a way by the public, though it is evidence from which dedication may be presumed, does not create a *Presumptio juris* in favour of dedication, which must prevail unless rebutted.

Per Earl Loreburn. The presumption of dedication from long continued user of a way by the public is one of law, though it does not make much difference whether it is called a presumption of law or fact.

Cedars Rapids Manufacturing and Paver Company *v.* **Lacoste** (1914) A. C. 369.

Land acquisition—Value of Land acquired for an undertaking—not value as part of the undertaking, test.

Where a company had power under a statute to develop water powers in a certain river and were given authority for the carrying out of the undertaking to acquire adjacent lands.

Held that the value to be given to the owners of those lands was not on the one hand its mere agricultural value, nor on the other hand its proportionate value in the companys' undertaking but its price enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have

ruled had the land been exposed for sale before any undertakers had secured the powers or acquired the other subjects which made the undertaking as a whole a realised possibility.

Sincloir v. **Broughan** (1914) A. C. 398.

Mixing of Funds—Right under—Company—Ultra vires borrowing—action of money had to the use of—Not available when based on ultra vires transaction—Test of maintainability.

A building society with unlimited powers of borrowing started a banking business and in the course of that business, large deposits were taken and invested in various kinds of ways. The business failed and on the depositors claiming their amounts, the Lower Court held that the banking business was *ultra vires* and therefore the depositors were entitled only to what remained after the share holders were paid in full. On appeal the House of Lords held that the borrowing was *ultra vires* as the borrowing powers should in principle be limited to the purposes for which the Society was incorporated but that the share holders as well as the depositors should share proportionately to their contributions as the assets that remained were the assets of the banking business which must have been built up partly with the funds contributed by the share holders, and partly with the deposits. Subject to the right of any person that can trace his money to any particular asset, their Lordships held the whole body of depositors and the whole body of share holders should share the deposits.

Their Lordships held however that the view of Moulton L. J. that the amounts of the deposits should be paid first as money had to the use of the creditors could not be upheld. The action of money had to the use of, was an action *quasi ex contractu* and as such could not be maintained under circumstances in which an action on the contract if there were one, could not have been maintained. Their Lordships agreed with the majority of the Court of appeal, that the rights of the creditors on an *ultra vires* borrowing were limited to what they would be entitled to on the principles of subrogation and of tracing.

Their Lordships make it clear that the principle of *Re Hallet's Case viz.*, that when a person in a fiduciary capacity mixes up his own funds with the funds of the *cestui que trust* and pays it for instance to his account at the bank, the latter has a

charge on the debt due from the bank, applies equally to all cases of wrongful mixing up provided that the relationship of debtor and creditor has not been validly created between the parties.

North Western Salt Company *v.* Electrolytic Alkali Company (1914) A. C. 461.

Practice—Illegality—Contract in restraint of trade—Need not be pleaded if illegal on the face of it—Otherwise if illegal only by reference to surrounding circumstances.

Where a contract is on the face of it illegal as being in unreasonable restraint of trade, the Court is entitled to as well as bound to decline to enforce the contract whether the invalidity is pleaded or not but where the illegality can be made out only by reference to surrounding circumstances it is not a matter which the Court could itself take notice of and adjudicate upon.

Williams Brothers *v.* Edward T. Agins (1914) A. C. 510.

Contract for sale of goods—Measure of damages—Contract by Vendee—Irrelevant.

Where there is breach of a contract for sale of specified articles, the measure of damages is the difference between the contract price and the market price and the amount of damages is not affected by the fact that the plaintiff has entered into a contract with a third party which would bring him less than the market price and even if the defendant *i.e.*, the party in default takes an assignment of that contract the damages that he is entitled to is a matter for counter claim and not a thing to be directly taken note of in the action for damages on the breach of the original contract. An arbitrator to whom the question of assessment of damages is referred is not entitled to take into consideration matters which may be made the subject of a counter claim.

In the assessment of damages, there is a difference between late delivery and non-delivery. In the former case, all that the purchaser is entitled to is the difference between the market price and the price he is able to get for his goods.

The King *v.* **Christi** (1914) A. C. 545.

Evidence—Statement made in the presence of the accused—Admissibility of—Rule of practice.

In this case, their Lordships hold that a statement made in the presence of an accused person relating to the offence with which he is charged is evidence whether the accused admits the truth of it or denies it, but its value depends upon the extent to which it is accepted by the accused expressly or implicitly by his conduct, or demeanour. The direction usually given to the jury that they should exclude the evidence if it has not been so accepted by the accused is a rule of practice which has acquired almost the sanction of law but is not law.

As to rules of Evidence in criminal trials says Lord Reading: the principles of the. laws of evidence are the same whether applied to Civil or Criminal trials but they are not enforced with the same rigidity against a person accused of a criminal offence as against a party to a civil action.

There are exceptions to the law regulating the admissibility of evidence which apply only to criminal trials and which have acquired their force by the constant and invariable practice of the Judges when presiding at Criminal trials. They are rules of prudence and discretion and have become so integral a part of the administration of the Criminal law as almost to have acquired the full force of law. A familiar instance of such practice is to be found in the direction of judges to jury strongly warning them not to act upon the evidence of an accomplice unless it is corroborated.

Equitable Life Assurance Society of the United States *v.* **Reed** (1914) A. C. 587.

Statute—Rule dictated by public policy—Contract out of or waiver not permitted—Rule not to be extended.

S. 64 of the Life Insurance Act of New Zealand provides that no policy shall be void by non-payment of premium so long as the surrender value of the policy is more than the premium in arrear. Two questions arose in connection with the construction of this section, first, whether it was open to parties to contract out of these provisions; secondly, whether the policy which provided for the issue of a paid up endowment policy in the event of lapse or at

the option of the assured, cash amounts in lieu thereof came within the section. Their Lordships held that the section laid down a rule of public policy and that therefore it was impossible for the assurer or the assured to contract himself out of it or waive the benefit of it, but that according to well known principles where something not *Ipsa natura* unlawful is prohibited by statute the words of the prohibition must be taken as they stand and cannot be amplified in order to meet a supposed evil or restricted in order to protect a natural freedom and the section having provided only for cases of surrender value and the case not being one of surrender value the section did not apply and the lapse of the policy was not prevented.

Ibrahim *v.* **Emprerор** (1914) A. C. 599.

Evidence—Statement by accused while in custody and in reply to question by official superior—Admissibility of—Extension of English Law " so far as circumstances permit "—Effect of.

This case contains an interesting discussion by Lord Parker as to the admissibility of confessional statements made by an accused person while in custody and in answer to questions put by the person in whose custody he was. His Lordship inclines to the opinion that those are circumstances that go to the weight and not to the admissibility of the statement. If the statement is not a voluntary statement and was procured by threat or fear of punishment it is inadmissible; otherwise it would be admissible. His Lordship thought that even if that opinion was not the correct opinion there was no ground to interfere in an appeal in a criminial case as such a view did not involve any violation of natural principles of justice. His Lordship also indicates as his opinion that when English Law is made applicable so far as circumstances admit, strict rules of English Law are liable to be varied by considerations as to the necessities of local order. Another question arose in the case that is to say whether an Afghan subject enlisted in the British army and stationed at Hongkong was triable by the British courts. Their Lordships held that he was a person enjoying His Majesty's protection and therefore triable.

Payana Reena Saminathan v. Pana Lana Palaniappa (1914) A. C. 618.

Ceylon Civil Procedure Code, S. 34—Cause of action—Suit on promissory note—Suit on claim for which note was given—Obligation and collateral security not one cause of action.

A claim of the respondent against the appellants was settled at a certain amount by arbitrators and a promissory note was given for that amount. When action was brought on the pronote, it was found that the pronote had been materially altered and the action was dismissed. The respondents then brought an action on their original claim which was also dismissed on the ground that S. 34 of the Ceylon Civil Procedure Code (corresponding to Order 2, R. 2 of our C. P. C.) barred it. On appeal, however the suit was decreed on the footing of the settlement. From that decree an appeal was brought to the Privy Council. Their Lordships agreeing with the Appellate Court held that the action was not barred. Their Lordships held the pronote and the settlement were not parts of the same cause of action but in truth were inconsistent and mutually exclusive causes of action. So long as the note was outstanding there was no right of action otherwise than upon the notes. Though the notes were the mode of payment contemplated by the award through an innocent act of the plaintiff the promissory notes having become incapable of being enforced and the defendants having availed themselves of it and refused to pay, the plaintiff was relegated to his original cause of action *viz* the liability established by the award.

Discussing the section, Lord Moulton observes that the it is directed to securing the exhaustion of the reliefs in respect of the same cause of action and not to the inclusion in one and the same action, of different cause of action, even though they arise from the same transaction. His Lordship also observes that an obligation and collateral security are different causes of action though for the purpose of that section they are enacted to constitute one cause of aciton.

Arnold v. The King Emperor (1914) A. C. 644.

Privy Council Practice—Criminal cases—Appeal—Conditions under which entertainable—violaton of natural Justice.

In this case, their Lordships review the earlier cases and authoritatively lay down the conditions under which appeals will

be entertained by the Privy Council in Criminal cases. The conditions are thus stated by Lord Shaw:—

It will not interfere with the course of Criminal Law unless there has been such interference with the elementary rights of an accused as has placed him outside the pale, of the regular Law or unless within that pale, there has been a violation of the natural principles of justice so demonstratively manifest as to convince their Lordships first, that the result arrived at was opposite to the result which their Lordships would themselves have reached and secondly, that the same opposite result would have been reached by the local tribunal also if the alleged defect or misdirection had been avoided.

His Lordship cites *Lanier's*[1] case as the fair type of the cases in which their Lordships would interfere. It must be established clearly that justice itself in its very foundation has been subverted and it is therefore a matter of general imperial concern that by way of an appeal to the King it be then restored to its rightful position in that part of the Empire.

Cameron v. **Cuddy** (1914) A. C. 651.

Contract—Deductions to be determined by arbitrators—Failure of arbitration—Duty of the court to direct inquiry that ought to have been done by arbitrator.

" When an arbitration for any reason becomes abortive, it is the duty of the court of law in working out a contract of which such an arbitration is part of the practical machinery, to supply the defect which has occurred. It is the privilege of the court in such circumstances and it is its duty to come to the assistance of the parties by the removal of the impasse and the extraction of their rights. This rule is in truth founded upon the soundest principle; it is practical in its character and it furnishes by an appeal to a court of justice the means of working out and of preventing the defeat of bargains between parties.

Accordingly where a contract for the sale of goods for a certain price also provided that in case any deficiency was found in the goods supplied, deduction was to be allowed such as is awarded by certain named arbitrators. The award having become abortive their Lordships held that the court should direct an inquiry into the deductions that are properly allowable

1. (1914) A. C. 211= 26 M. L. J. 1.

and the amount should be given credit for in the very action for the purchase money.

In re Oxley:—**Jonn Hornby & Sons** *v.* **Oxley** (1914) 1 Ch. 604 (C. A.)

Administration—Executors—Carrying on the business of the testator—No power to—Executor's right to indemnity—Rights of the creditors of the testator and the creditors of the executors—Knowledge—Acquiescence—Priority.

The testator who was carrying on a business made a will, containing no provision as to carrying on the business, by which he disposed of all his property absolutely to his widow and he appointed his widow and his son as his executors. The executors *to the knowledge of the creditors of the testator,* continued the business of the testator for four years from the earnings from which the widow was carrying on her livelihood. The creditors of the testator obtained judgment in a creditor's administration action and a receiver was appointed; subsequently, the creditors of the business carried on by the executors took out the present summons asking for a declaration that the executors as such were entitled in priority to the creditors of the testator at his death, to be indemnified out of his estate against all the debts and liabilities incurred by the executors in the business to the full amount of such debts and liabilities, and that the creditors of the executors in the business were entitled to be subrogated to the rights of the executors in respect of the indemnity.

Held, the rule of law established in *Dowse* v. *Gorton* [1] is that if with the assent of the creditors of the testator, the executors carry on the business for the benefit of the creditors or for the estate, the creditors are in precisely the same position as beneficiaries under the will and cannot take the benefit of the subsequent assets without giving effect to the indemnity. In the present case it was only for the benefit of the widow and not for the creditors that the trade was carried. Mere knowledge on the part of the creditors would not amount to assent by them. So the subsequent creditors and the executors were not entitled to the indemnity claimed.

Dictum of *Kekewich J* in *In re Brooke*,[2] and of the Master of the Rolls in Ireland in *In re Hodges* to the contrary, *disapproved.*

1. (1891) A. C. 190.
2. (1894) 2 Ch. 600 at 607.

JOTTINGS AND CUTTINGS.

Sir William Anson. The name of Sir William Anson will be remembered for many generations by lawyers and Oxford men. His knowledge of law was profound, and his works will rank as legal classics for all time ; his books on contract law and constitutional law are, as some critic said, "unique." As Warden of All Souls, and Vice Chancellor of Oxford University, he took a keen interest in all matters appertaining to the University. He was not only the learned professor, but the shrewd man of business blessed with a kindly disposition. The English law will always owe a debt of gratitude to the late Sir William Anson. *Law Notes July.*

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Sir Douglas Straight was a most versatile man. He was equally at home at the Bar (he practised at the Old Baily), on the Bench (he was for some time a Judge in India), or in the editor's chair of the *Pall Mall ;* a great worker, but one who did his work with such ease that many thought him almost a man of leisure. He possessed a pleasing personality and a genial disposition. He leaves a wide circle of friends who will mourn his loss. *Ibid.*

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The Elasticity of the Common Law.—The late Mr. Justice Wright, in his extremely able treatise on the Law of Criminal Conspiracies, published before his elevation to the Bench, set forth a series of elaborate arguments to show that the Common Law contains no warrant whatever for the extension in the eighteenth century of the law of conspiracy to cover trade unions and other associations for purposes in restraint of trade, but not otherwise criminal. The old Edwardian statute *De Conspiratoribus*, which is the foundation upon which so elaborate a superstructure as the modern law of conspiracy has been erected, was in reality aimed only at associations engaged in treasonable or semi-treasonable practices. But while the historical arguments of Sir Robert Wright are really unanswerable, it has been pointed out by Professor Dicey that similar arguments would dispose of almost every leading doctrine of the Common Law enforced at the present day. Legal doctrines begin within a narrow field and get an ever wider application. The same arguments were repeated by Mr. Simon, as he then was, when appearing for the defence

ten years ago in *Rex* v. *Brailsford* ([1905] 2 K. B. 730); he argued strongly against the extension of the criminal law to a case of conspiracy not covered by existing rules. In that case the co-defendants had conspired to obtain passports admitting exiled persons to Russia against the will of the Czar's Government. Such a conspiracy was not within any of the well-recognised categories to which that offence extends—namely, agreements to commit a crime, agreements to commit a malicious tort or a breach of contract specially injurious to the public at large, and agreements to procure the commission of a fraudulent, corrupt, or immoral act. But the Court held that a conspiracy to obtain passports from our Foreign Office for an improper purpose was opposed to public policy, and therefore within the mischief of the Common Law rule. Curiously enough, it has become the task of Sir John Simon, now Attorney-General, to answer on behalf of the Crown in Colonel Whitaker's appeal the arguments formerly advanced by him for the defence in *Brailsford's* case. And his line of argument has consisted in claiming for the Common Law an inherent right to expand so as to adapt itself to the novel exigencies of modern conditions. But where the criminal law is concerned this doctrine seems dangerous. If it is necessary to extend our penal laws the Legislature is quite competent to undertake the task. The duty of *boni judicis ampliare jurisdictionem* is a sacred duty, but when it trenches on the liberty of the subject it ought to be jealously watched. *The Law Journal* *July* 4, 1914.

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Discipline of the Bar:—Dr. Blake Odgers, K. C., in the course of a lecture on 'The Discipline of the Bar' to barristers and students of the Inns of Court, at the Old Hall Lincoln's Inn, last week, said that knowledge of the law alone did not make a barrister a competent defender of the rights of his client. He was better fitted for the work if he had spent some time in a barrister's chambers as a pupil, where, besides doing the 'paper work,' and accompanying his chief to Court to see 'how it was done,' he might occasionally get a chance of holding the chief's papers himself. The young barrister must not adopt any indirect methods of getting work; he must wait. He would not know why work came to him or why it left him. One way of advertising, which was honourable, was to write a book on some

branch of law. Circuits and sessions were part of the organisation of the Bar which was devised to reduce competition among the barristers. At most sessions all briefs, whether for the prosecution or defence were, confined to the Sessions Bar. The lecturer referred especially to the duties which a barrister owes to the Court and to other barristers. When a young barrister expressed surprise at the ruling of the Judge and was severely criticised for doing so, his leader apologised for him with the observation, 'When my junior is as old as I am he will never be surprised at anything your Lordship says or does.' Then, too, they must be courteous to witnesses. A barrister who had been browbeating a witness went so far as to ask, 'And, Sir, didn't your father do the same thing on a previous occasion?' 'I don't know,' was the reply; 'he's over there, you had better ask him,' and the witness pointed to the jury, of which his father was a member. 'A few barristers still go in for getting applause from the gallery. Don't do that,' added Dr. Odgers, who finally asked his audience to remember the 'rule of the three ups—stand up, speak up and shut up.' *Ibid.*

Miscellancy There has always been a tendency on the part of unthinking critics to extol the industrious habits of past generations of lawyers, and to compare the giants of other days with their degenerate descendants. An examination of the facts seems (says the *Daily Telegraph*) to establish that there has been no great falling-off in point of application. When Lord Campbell was Chief Justice the legal day was much what it is now. We learn from his diary that it was habit to proceed to Westminster on horseback, and that he was usually the first of the judicial staff to put in an appearance. Then 'in drop my lagging puisnes, and after a little friendly gossip we take our places on the bench. Here we sit from a few minutes past ten till about half-past four.' There is a certain vagueness in the 'few minutes past ten' and 'about half-past four' which encourages the belief that the judicial day may have more closely resembled the 10,30—4,0 of yesterday than the 10,15—4, 15 of to-day. But, however the time table may have been worked, the difference was not great. These were the hours for sittings 'in banco.' In the 'thirties' and 'forties' of the nineteenth century the Nisi Prius sittings began when the day was younger. While Lord Denman was Chief Justice special juries and common juries were

gathered into the box and sworn as early as 9-30 a.m. Lord Campbell, C. J., made a change by summoning the good man and true for ten o'clock. But late sittings were not unknown. The last-named Chief Justice records that on the closing day of one term he sat till ten p.m., and wax-candles at the Old Bailey were in constant use. During some part of the eighteenth century the Court of Chancery sat well on into the night, but evening sittings were finally abolished in the reign of George III. *Ibid*

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The Rule in Wood v. *Leadbitter.*—The case of *Wood* v. *Leadbitter* goes no further, it is said, than to establish the rule that a mere license (even though under seal) is revocable; the reason being that such a license confers no interest in land, but only makes lawful what would without it be a trespass. The revocation of the license, if premature, is a breach of contract for which an action for damages may be brought against the licensor. But if the licensee insists, after the revocation, in remaining on the land he becomes a trespasser and is liable in an action accordingly at the suit of the licensor. The result is that in such a case both parties are in the wrong as well as in the right, and each of them can sue the other as well as be sued by him. 'Since the fusion of law and equity', says Mr. Salmond ('Law of Torts,' p. 241), 'it may be assumed that the rule in *Wood* v. *Leadbitter* no longer applies to licenses which are of such a nature that they are specifically enforceable, and therefore constitute equitable servitudes over the servient land. It would be difficult to hold that a licensee is a trespasser because of doing an act which the licensor may be compelled by injunction to allow him to do.' If this is so, the old rule can apply only to those cases in which a licensee is limited to an action for damages and has no claim to specific performance. If a license is not fit to be specifically enforced, it is fairly arguable that neither is it fit to be exercised in defiance of the will of the licensor; and the sole remedy of the licensee in such a case would be a claim for pecuniary compensation. Modern courts of equity have gone further, and, extending the principle laid down by Sir George Jessel in *Walsh* v. *Lonsdale* [1882]; that since the Judicature Acts there are not two estates as there were formerly, one at common

law and another in equity—'there is only one estate and one court and the equity rules prevail'—they have been inclined to treat *Wood* v. *Leadbitter* as no longer binding at all. In the action of *Hurst* v. *Picture Theatres* (*Lim*)., tried before Mr. Justice Channell and a special jury last November, that learned Common law judge expressed the opinion that the case was now obsolete, and he held that if a visitor to a theatre had paid for his seat he had a right to retain it during the performance so long as he behaved himself quietly and kept within the regulations laid down by the management. The Court of Appeal has now (by a majority) confirmed this view, and Lord Justice Buckley in giving judgment (July 8) said: A license coupled with an agreement not to revoke it for good consideration confers an enforceable right, and the grant of a right to enter upon premises and see a spectacle includes, a contract not to revoke it till the performance is ended.' That puts 'the right to a seat' on inexpugnable legal grounds, and, if it does not override the rule in *Wood* v. *Leadbitter*, leaves little to which it can still be said to apply. *Ibid. July* 18.

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'Meaning' and 'Intention', in a will.—The cardinal rule in the construction of wills is to give effect to the intention of the testator. But, say the old authorities, 'where the words of a will have a plain sense, and no doubt is, in any matter, within or without the words touching the matter of the devise, there the words of the will shall always be taken to be the intent of the devisor, and his intent to be what the words say', (Bacon's Abridgment, 'Wills and Testaments'). And the distinction between 'meaning' and 'intention' is pressed home in such judgments as those of Baron Parke in *Sams* v. *Gurlick* [1845]—'Intention may mean what the testator intended to have done, whereas the only question in the construction of wills is on the meaning of the words'—and of Baron Rolfe in *Groves* v. *Burningham* [1850]—' We are to ascertain by construing the will *non quod voluit sed quod dixit*, or rather we are to ascertain *quod voluit* by interpreting *quod dixit*.' Even so modern a judge as the late Sir John Gorell Barnes expressed the same view in *Simpson* v. *Foxon* [1907] when he said, 'What a man intends and the expressed intention are two different things. He is bound, and those who take after him are bound, by his

expressed intention. If that expressed intention be unfortunately different from what he really desires, so much the worse for those who wish the actual intention to prevail.' These are hard sayings, and they seem to conflict not only with the main principle, but with the general rule that in construing a will the Court is entitled to put itself in the position of the testator and to consider all material facts and circumstances known to him with reference to which he is to have used the words in his will. 'We ought to inquire,' said Lord Blackburn in *Bowen* v. *Lewis* [1884],' into all the ciscumstances which the testator would, or ought, to consider when making his will, and then say, not what was the intention expressed by such words used with reference to such circumstances.' *Ibid.*

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Equally Divided Benches :—It is a universal rule of judicial procedure that when a Court is equally divided no order can be made. In such a case, if the Court is a Court of first instance, the proceeding before the Court lapses automatically; if it is a Court of Appeal, the motion of appeal is lost and the order of the Court below stands good. In the phraseology of the House of Lords, the 'Non-contents' have it. To this rule there appear to be only two exceptions, for the common law rule of procedure at meetings which gives to the chairman a casting vote has no validity in courts of law. One exception arises when a member of the Court 'withdraws' his judgment, and so allows a decision to be given by the Bench; this arises in the Divisional Court whenever the junior of two Judges sitting together adopts the practice of withdrawing his judgment—a practice which, it has been stated recently, is now to be abandoned. The other exception arises when two Justices sit together, one of whom is a stipendiary and the other an unpaid Justice; if they differ, the stipendiary can convict by virtue of his powers to act alone as Summary Jurisdiction Court; the unpaid Justice is assumed to have 'acquiesced' in the stipendiary taking sole seisin of the case (*Rex* v. *Thomas*; *ex parte O'Hare* 78 J. P. 55). In all cases in which justices are divided, except this one exception, there can be no order on the summons,

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CONTEMPORARY LEGAL LITERATURE.

The place of honour in the July number of the *Journal of the Society of Comparative Legislation* is given to an address delivered by *Viscount Haldane* at the University College, London on the meaning of Truth in History. He says that truth in History is not to be attained by mere scientific analysis of the facts but by a combination of scientific research with a true sense of art, not by a massing together of details but by a careful selection of facts and their presentation so as to give a true and complete portrait of the spirit of the time. Mr. Norman Bentwich describes the extent to which recognition is given to jewish Law in private International Jurisprudence. The Jewish system is based on the Mosaic Books of Exodus and Deutoronomy as developed in the Talmud. From these sources, great Rabbis from time to time compiled legal codes which received universal acceptance by reason of their intrinsic excellence. Though they cover the whole period of jurisprudence and are still in use in eastern countries, so far as European countries are concerned their application is limited to the topics of marriage, divorce, and succession. Even as to these the recognition given varies according to countries. In England, direct recognition of Jewish law is now reduced to a very small sphere; the form of the peculiar formalities of the betrothal and the placing of right on the bride's finger before witnesses which constitute a Jewish marriage were recognised as substitutes for the publication of banns and the presence of a clergyman even before the passing of the Jewish Marriage Act of 1836. On questions of incapacity, however, it is wholly disregarded. The law of domicile determines exclusively capacity for marriages. Nor is the Jewish law of divorce recognised. Jews and Jewesses wherever married cannot obtain a valid dissolution of their unions if they are domiciled in England unless the English Divorce Court grants a decree in accordance with the statute of 1857, and that even if the countries in which the marriage was celebrated recognised the validity of the Jewish law of Divorce *e.g.*, Russia and Austria. This works a real hardship, the Jewish law being more liberal in the granting of divorces than the English. France does not recognise the Jewish system for any purpose except a system of law permitted to regulate the marriage, divorce and

succession of the Jews in some foreign countries. In the French Protectorates however the Jewish community maintains complete autonomy as regards their personal law. The same is the case with Egypt. Mr. F. B. Edwards discusses as to who are *Natural born Bitish Subjects according to the Common Law.* The test of British nationality under the common law is birth within the protection of the Crown of England. Ordinarily this is limited to the British dominion. Protectorates are not British dominions for this purpose. They do not become by such birth English subjects. They become English subjects if born within England, if born within Scotland, they become Scotch subjects, and so forth. Even if they are subjects of the King of England in his capacity as the sovereign of another country, still they become British subjects as a result of which they have none of the disabilities of aliens, though they may not have the privileges of English subjects. The rule above stated as to the necessity of birth within protection of the King is subject to certain exceptions:— (1) The children of the king wherever born are British subjects, (ii) Children of foreign ambassadors etc., though born inside England, and those of English ambassadors though born in the countries to which they are accredited, retain the nationality of the parents, (iii) all persons born upon a British public vessel wherever situated and (iv) all persons born upon a British private vessel unless she be in the territorial waters of a foreign state not subject to a right of innocent passage are British subjects, (v) children of foreign enemies are aliens though born in England.

Mr. Sargant discusses the changes of the proposed Aliens Bill of 1914 would effect on the common law. This bill purposes to extend British nationality to children of British subjects wherever born, and to withhold the same for children of Foreigners though born within British dominions. It seeks also to recognise "local naturalisation," for instance naturalisation in Canada for Canadian purposes as distinguished from "naturalisation" as a British subject. To the Asiatic subjects of His Majesty this Bill is of interest as making clear that uniformity of racial treatment (which was recognised for instance in the proclamation of the Crown in 1843) no longer holds the ground and local legislatures are assumed to possess the power to exclude them from the benefits of citizenship.

Mr. *Beeker* gives an account of the Japanese Marriage Law. The Japanese marriage is like Christian marriage strictly monogamous. A bigamous marriage is however not void *ab initio* but valid until cancelled. The bridegroom must be at least 17 and the bride 15. Till the age of 30 for the male, 25 for the female consent of parents is insisted upon. Registration is required as a condition of all valid marriages; in its absence, marriage is only concubinage. Legitimation by marriage is recognised. Divorce is permitted for certain specified causes. Parties guilty of adultery are not permitted to marry each other. Consent of the husband is required before the wife could borrow a loan or sell or mortgage her property, make or accept gifts, or institute suits.

In the Michigan Law Review for June Mr. *Roscoe Pound* traces the genesis of *the lay tradition about the lawyer.* He attributes it to the jealousy which the position of the Lawyer has always excited in the other less favoured professions, the ecclesiastical in middle ages, the medical, the engineering and the scientific in later times. He considers it in effect a tribute to the position of the lawyer in the community that the tradition gives so uncomplimentary an account of him.

Mr. *Henry Bigelow* discusses the content of covenants in leases, that is to say when covenants run with the land or the reversion. The test of such covenants according to *Spencer's case* is that they must " touch or concern the thing demised. " The same idea is expanded by Lord Ellenborough in *Congleton* v. *Pattison* [1] and it is said that they must " affect the nature, quality or value of the thing demised or the mode of occupying it. " A second statement not so frequently quoted is that of *Best J* in *Vyoyan* v. *Arthur* [2] that if "it be beneficial without regard to his continuing owner of the estate, it is a mere collateral covenant upon which the assignee connot sue. " Covenants that run may be classified into two groups: —Those that restrict the real rights of the lessor or the lessee as such and those that benefit the lessor or the lessee as such, right being understood to include privileges and immunities. Covenants by the lessee of the first sort will run with the lease hold but whether the benefit will run with the reversion would depend upon their satisfying the condition of the second

1. (1808) 10 East 130. 2. (1823) B. & C. 411

group. Covenants by the lessee that fall within the second group will run with the leasehold as well as the reversion, Covenants of the lessor of the first group will necessarily satisfy the test of the second group and therefore will always run both with the reversion and the lease. If the covenant of the lessor benefits the lessee as such, the benefits thereof will pass to the assignee and the burden also will run with the reversion even though the covenant does not restrict the estate of the lessor provided the act to be done is to be done on the premises.

Mr. Edward Rogers points out what he calls the expensive futility of the United States Trade Mark Statute"

In the Green Bag for July Mr. Edgar White gives some instances of men who have grown younger by practising the law. The thing which has kept them young according to Judge Shelton has been work, hard incessant work. "While many a younger lawyer has closed his books and gone wearily to bed, these competent veterans have kept the lights blazing in their offices far into the night. A characteristic of each of them is, he never assumed to know everything. He was always studying, always acquiring more information, always a diligent student of that hard taskmaster, the law. They are striking examples of the great truth that work does not kill but develops and lengthens life."

BOOK REVIEWS.

CODIFICATION IN BRITISH INDIA. *Tagore Law Lectures 1912, by Bijoy Kisor Acharya, B. A., LL.B.* Though not taking a place among some of the best productions that the Tagore foundation has been responsible for, the volume under notice is full of useful and interesting information on the history as well as the possibilities of codification of law in British India. The reasons for and against codification have been so fully discussed since the days of Bentham that there is little to add; but the collection of the many features of the controversy is not without its use. The author has now and then also drawn attention to the history of codification in other countries. The chapters bearing on the codification of the personal laws of Hindus and Mohammedans deserve special notice at the

present time when a growing body of educated opinion in the country is advocating the interference of the legislature in one form or another; if not to codify at least to settle some points of Hindu law. The author's suggestion of a standing law commission is certainly worth serious consideration. But it need scarcely be pointed out that a wholesale codification of Hindu and Mahomedan Laws is undesirable. There can be no doubt also that the scope for future codification in this country is comparatively limited as a substantial portion of the ground has already been covered. And an appreciation of the advantages of codification ought not to blind us to its defects. In any view, a clear and accurate knowledge of its past history in the country is indispensable for the proper direction of its course in the future; and in helping us to this the learned author has rendered a valuable service. In going through the book one feels now and then that some points are spun out a bit too much; but perhaps the author is not altogether to blame for it. The quotations again are so many and often times so long that the author has not much of his own to say, but even this is not without its advantages.

The Indian Arms Act with rules by Mr. Iqbal Singh, B. A., L.L.B., Pleader, Chief Court, Punjab (1914) we heartily welcome this very useful book on the Arms Act. It contains all the available information as to arms, how they are to be transported, what duties are to be paid, who are exempted from taking out license, what relationship the Arms Act bears to the Explosives Act and numerous other matters whether to be found in statutory enactments or Government rules and orders or judicial decisions. The get up is unexceptionable.

The Law of consideration and of Compromise in British India, by Jnanendra Nath Chaudhuri B. L. Rai M. C. Sarcar & Sons, Calcutta. In this small book the author has endeavoured to explain fully and clearly with reference to the English and Indian Case law a number of topics connected with the two subjects mentioned in the title. Though it is stated that the matter has been recast and re-written since it appeared in the form of a number of articles in the Calcutta

Weekly Notes and the Bombay Law Reporter, the work still bears many of the marks and some of the defects of Journalistic form. But not being in the shape of a running commentary on the Contract Act, it has given scope to the author to arrange the matter in his own way and bring in several allied topics for discussion. The law of consideration is dealt with in 5 chapters, the first two explaining general principles and rules and the rest dealing with proof of consideration, want or failure of consideration and some questions arising under the law of registration. The introduction contains a short but clear history of the law as to consideration in England. The second part of the book consisting of 9 chapters deals in part with the contractual aspect of compromises and largely with several questions of adjective law in connection with effecting, enforcing and setting aside compromises and the operation of compromise decrees. We find that in some places the statement of the law is not as complete and accurate nor the discussion as full as one should desire, especially if the book is to be of use to practitioners. We may mention as instances, the subject of suits based upon and independent proof of original consideration where the document is an unstamped pro-note (see P. 79) and third parties' right to the benefit of contracts as to which there has recently been gathering a substantial mass of case law in this country.